No. 4024.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John English,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

Plaintiff in error, John English, was convicted and sentenced with one Spratt on a charge of conspiracy to violate the National Prohibition Act, under section 37 of the Federal Penal Code, the said indictment charging that the said defendants, with others unknown, conspired to sell whiskey for beverage purposes and to transport and possess the same in Fresno county, California. The overt acts alleged in the indictment are correctly set out in plaintiff in error's

brief under the statement of the case (pp. 2 and 3 thereof).

The evidence introduced on behalf of the defendant in error conclusively shows that defendants are guilty as charged in the indictment.

Although the burden of showing error rests with the plaintiff in error, defendant in error herewith presents a statement of the evidence in support of this contention.

Witness Simpson testified that she knew the defendants Spratt, Burke, and English; that on the 9th of January, 1922, she had a conversation with defendant Spratt in the presence of Lulu Johnson and Special Agent Parker, at the home of the defendant Spratt, 631 O street, Fresno, in which she and said Parker told defendant Spratt that they wanted to buy some bonded whiskey; that Spratt thereupon agreed to sell it in ten-case lots at $125.00 a case, and alcohol at $10 a gallon, both of which he said he could get from a man whom he said he knew, in San Francisco, and agreed to deliver to Simpson and Parker ten cases of whiskey and ten gallons of alcohol on January 13, 1922, at 631 O street, Fresno, California; that thereafter, on the 13th day of January, 1922, while she was at said premises, at about seven o'clock, she met defendant Spratt, who accompanied her from his house to her hotel; that en route to her hotel defendant Spratt told her that the man was waiting on the highway with the said load of liquor and asked if Mr. Parker had the money to pay for it, and that she told Spratt that

Parker did have the money, and Spratt said, "Can I depend on you to be there at seven-thirty o'clock," to which she replied, "Yes;" that both she and Parker would be there at seven-thirty o'clock, at which time defendant Spratt said the man would deliver the liquor; that she returned to 631 O street about a half hour later with witness Parker and there found Spratt; that while she was there defendants Burke and English, who then gave his name as John Kelly, came in; and that on said occasion defendant English brought with him to the said address 184 one-fifth gallon bottles of intoxicating liquor in an automobile; and in the presence of all the said defendants she saw a dishpan full of one-fifth gallon bottles of liquor labeled "Old Taylor;" that she had first met defendant Burke about December 19 but did not see him again until after January 3, 1922; that she had seen him between the 3d and 13th possibly six times at the home of defendant Spratt, 631 O street, Fresno; that she had had no conversation with Burke relative to liquor; that the first time she met English was on the night of January 13, at 631 O street; that on the 20th of December, at 631 O street, where defendant Spratt lived, in the presence of defendant Burke, she had purchased from one Johnson and defendant Spratt a bottle of whiskey, which she identified as the one shown her. [Tr. pp. 45 to 50 and 58 to 60.]

Witness George B. Parker testified that he knew the defendants Spratt, Burke, and English; that he,

in company with D. D. Simpson, had met Spratt and one Lulu Johnson at 631 O street on the 8th of January, at which time Agent Simpson asked Spratt if he could supply liquor, and Spratt answered, "Yes," and asked them what kind of liquor they wanted and how much; that they told Spratt they wanted about ten cases, and were informed by Spratt that the liquor was bonded, and that he could also supply alcohol to them; that Spratt told them he could get liquor from a man in San Francisco and that he would send for it and have it there Friday night (January 13); that he was there Friday night and saw a bottle of liquor in defendant English's pocket; that defendant Burke had arrived at the place of delivery about five minutes before defendant English; that a dishpan full of bottles of the same kind of liquor that English had in his pocket was brought in; that defendants Spratt and English were brought in a few minutes after; that the bottle in English's pocket and the bottles in the dishpan were one-fifth gallon size; that he did not remember the name on the bottle but that all the bottles were stamped; that he is familiar with Spratt's handwriting; that he had seen Spratt sign his name about twenty times; that he had seen Spratt's signature and handwriting on innumerable occasions; and that the signature on the telegram (United States Exhibit 1) was Spratt's. [Tr. pp. 50 to 55.] This exhibit read:

Fresno, Cal., January 11, 1922.

John English, 745 Market street, care of Golden Rule, San Francisco. "Need ten shares of stock Friday." (Signed Spratt.) [Tr. pp. 61, 69.]

WITNESS LULU JOHNSON testified that she had seen a bottle like the one concerning which witness Simpson testified, which bottle was brought to her house (631 O street) with twelve other bottles by defendant Spratt; that one of said bottles was sold to witness Simpson; that for about a week she had heard Spratt, Simpson and Parker talk about liquor; that the gist of the conversation so heard was that the witnesses Parker and Simpson were trying to get the liquor, one so much, the other so much—get it together and deliver it to suit themselves; that she had heard Spratt say that he thought he could get it; that defendant Burke was there on the night of January 13th, at which time she saw English brought in by the officers; that Spratt had said he had ordered the liquor; that she had seen a large dishpan full of bottles about the size of the bottle which Simpson had bought; and that the officers brought said liquor into the house the night of the raid. [Tr. pp. 63-64.]

WITNESS PARKER then identified a writing which had been signed in his presence by defendant Spratt. [Tr. p. 64.]

The writing was offered and received in evidence as against Spratt only; and read:

"On or about December 15, 1921, I ordered a case of 'Old Crow' whiskey from John English, *alias* Jack Kelley, which he delivered to me on that day. I first met English in the Pioneer Bar, where he gave me a drink. That was along about December 15, 1921. Later C. A. Burke called me over the phone and asked me to come to his office. When I arrived at

Burke's office English was there and offered me some more of the whiskey. After drinking it he asked me if I could handle some of it. I asked him how much it was and he made a price of $115.00 per case. I told him that I could not pay that much, but would like to get a bottle. He refused to sell less than a case, and after talking it over with Burke, I took a case, Burke agreeing to let me have the money to make the purchase. It was understood that it was to be taken to my house and as Burke wanted a bottle he was to come down and get it. He was to give me credit for whatever he took under this arrangement."

"After the dinner party on this day, and after Judge Irving had departed from the house, I had a long conversation with D. D. Simpson, then known to me as Irene Conlan, and George Parker, now known to me as a special agent of the Bureau of Internal Revenue. During this conversation arrangements were made whereby I was to act as an agent in the securing of ten cases of whiskey and ten gallons of alcohol. This liquor was to be secured from John English, *alias* Jack Kelley, and to secure same I wired to San Francisco to John English, 745 Market street, such telegram reading as follows:

" 'Can use ten shares of stock Friday,' and signed 'Spratt.'

"It was previously agreed between English and myself that in case I ordered whiskey I was to send a telegram reading in that way." [Tr. pp. 65 to 66.]

Witness Nicely testified that he saw defendants Burke, Spratt, and English at 631 O street on the night of January 13, 1922; and that on that occasion he had taken a certificate of registration (United

States Exhibit 5) from an Essex car, which said Essex car was registered in the name of John English (of San Francisco) with the Motor Vehicle Department of the state of California, and from which said car he had also taken a collection of bottles shown him, one of which he identified as United States Exhibit 6, and concerning which he testified that its alcoholic content was 55 per cent by volume; that it was in the same condition as when taken from the said Essex car on January 13, 1922; that the remainder of said bottles were then identified and introduced in evidence as United States Exhibit 7; that said Exhibit consisted of 184 (one-fifth gallon) bottles of alcoholic liquor which had been found in and moved from the said Essex car by him on said date. Witness further testified that before and after removing said bottles from said automobile he saw defendants Spratt, Burke, and English at 631 O street on the night of January 13, 1922. [Tr. pp. 66 to 68.]

Witness Sheldon Hunter testified that United States Exhibit No. 1, which was a telegram dated at Fresno, on January 11, 1922, addressed to John English, 745 Market street, care of Golden Rule, San Francisco, California, reading: "Need ten shares stock Friday," and signed, Spratt, which telegram left Fresno at 9:15 and was delivered at 10:10 to a man named H. Hahn; and that no part of his record showed that John English had ever received the telegram. It was thereupon stipulated that the said telegram, United States Exhibit No. 1, was sent from Fresno to San Francisco. [Tr. p. 69.]

ARGUMENT.

From the foregoing evidence, disregarding the declarations made by defendant Spratt during the progress and after the consummation of the conspiracy, the record discloses that witness Simpson had, on the 15th day of December, purchased a bottle of whiskey from defendant Spratt and Lulu Johnson; that about January 9, 1922, Agents Simpson and Parker went to the home of defendant Spratt and told him that they wanted to buy some bonded whiskey and ordered ten cases of whiskey and ten gallons of alcohol to be delivered January 13, 1922; that on the 11th of January Spratt sent a telegram (United States Exhibit No. 1) addressed to John English at San Francisco, reading: "Need ten shares stock on Friday; that thereafter, on Friday, the 13th of January, witness saw Spratt at about seven o'clock at his said home, from which place she went with him to her hotel; that while en route to her hotel with Spratt she told him that she and Parker had the money which they had agreed to pay for the liquor when delivered, and that she and Parker would return to his home at seven-thirty o'clock; that she returned to 631 O street about a half hour later with witness Parker, and she there found Spratt; that while she was there defendants Burke and English, who then gave his name as John Kelly, came in; and that on said occasion the defendant English brought with him to said address 184 one-fifth gallon bottles of intoxicating liquor in an automobile.

These circumstances furnish sufficient evidence from which the jury could infer that these several people were engaged in a conspiracy to procure, transport, possess, and sell intoxicating liquor. Certainly the said evidence lays a sufficient foundation for the introduction of the declarations made by Spratt, one of the defendants, during the progress of the conspiracy. This, with the said declarations of Spratt, makes out a remarkably strong case against defendant English, for, from the conversations had with Spratt, it is apparent that Spratt was in a conspiracy with a man in San Francisco to violate the National Prohibition Act as charged. The identity of this man was revealed when English appeared on the scene on January 13, with the liquor, at the time and place that defendant Spratt had fixed and concerning which he had arranged with witness Simpson and Parker.

It is submitted that this evidence connects the defendant English with the conspiracy sufficiently to authorize the admission against him of the statement of his co-conspirator Spratt.

In Taylor v. United States, 89 Fed. 954, this court (at p. 956) says:

> "We think that these facts were sufficient to establish a *prima facie* case against the plaintiff in error, so that the court was justified in admitting the statements of his co-conspirators which connected him directly with the offense which was charged against them all."

It is submitted that the same statement applies with equal force to the facts in this case.

Furthermore, there is another ground on which the declarations of Spratt made in the progress of the conspiracy were properly admitted, to-wit, the said statements formed part of the *res gestae* of the crime charged in the indictment. The general rule was stated in the case of Wiborg v. United States, 163 U. S. 632 (p. 657), where the court says:

> "There was evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that: 'If these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition,' and to this an exception was taken. The general rule was stated in American Fur Co. v. United States, 2 Pet. 358, 365, by Mr. Justice Washington, speaking for the court, that 'where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestae,* may be given in evidence against the others.' The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the motive and intention, declarations of those engaged in it ex-

> planatory of acts done in furtherance of its object came within the general rule and were competent. St. Clair v. United States, 154 U. S. 134; People v. Davis, 56 N. Y. 95, 102; Lincoln v. Claflin, 7 Wall, 132, 139; 1 Greenl. Ev. Sec. 111; Starkie Ev. 466."

Also to the same effect is the case of Fitter v. United States, 288 Fed. 582, and the case of Rea v. Missouri, 84 U. S. 532, 544, in whict the court says:

> "Any statements made by Fuller in the absence of Hayes, which were afterwards assented to by the latter, or which were part of the *res gestae* of the purchase of the goods, were competent evidence."

Furthermore the defendant in error cannot at this time question the admissibility of said evidence for the reason which appears in the record [Tr. p. 62] to-wit:

"Mr. Lindsay: I further object on the part of the defendant Burke that whatever defendant Spratt may have done would not be binding on him in the present stage of the testimony.

The Court: I will reserve my ruling as to him.

Mr. Lindsay: And English also?

The Court: Yes, sir. I might submit the whole matter to the jury under instructions."

Inasmuch as no exception was taken to the instructions of the court, its instructions must be considered as correct and that the defendants' rights were properly safeguarded and cannot be questioned at this time. Hence there can be no doubt that the rights

of the defendant (English) with regard to this evidence were fully protected.

Walton v. Tepel, 210 Fed. 161.

The only remaining question raised by the brief of plaintiff in error is the question of the effect of the telegram sent to defendant English (United States Exhibit No. 1), which was received in evidence without objection and concerning which defendant John English stipulated that it was sent from Fresno to San Francisco. The overt act alleged in the indictment to which this evidence was directed is referred to as "Overt Act No. 4," and this evidence proves the overt act as laid therein. No allegation is made that defendant English received the telegram. This same point was made in the case of Alderman v. United States, reported in 279 Fed. 259, where the court (on p. 261) says:

> "There was no error in the admission of the telegram, signed J. H. Alderman, addressed to Larnce Washbern. This telegram was proved to have been delivered for transmission to the telegraph company by the defendant Alderman, and was sent by the telegraph company to Tampa, as directed. The sending of this telegram was one of the overt acts charged in count 1. Proof of its receipt was not necessary to sustain this allegation."

It is submitted that the bringing of said intoxicating liquor to Spratt's house under the circumstances presented a question of fact for the jury alone to de-

termine, whether English, in so doing, was furthering the conspiracy alleged in the indictment.

The suggestion in plaintiff in error's brief (p. 18):

"* * * that his presence in Fresno on January 13, 1922, was by mere chance, and not in response to the telegram, which he did not receive,"

cannot be considered by this court. On this point the court, in Humes v. United States, 170 U. S. 210 (p. 212) says:

> "The alleged fact that the verdict was against the weight of the evidence we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict."

And in Alderman v. United States (*supra*), at page 260:

> "The weight of the evidence or credibility of the witnesses is not for this court. Humes v. United States, 170 U. S. 210, 212, 18 Sup. Ct. 602, 42 L. Ed. 1011; Crumpton v. United States, 138 U. S. 361, 363, 11 Sup. Ct. 355, 34 L. Ed. 948."

In closing, defendant in error submits to the consideration of the court the following defect in the record affecting the jurisdiction of this court to entertain this appeal.

The clerk's minutes for January 5 show that an order was obtained on that date extending the time within which to settle the bill of exceptions herein fifteen days from the date thereof. The time as so

extended expired on January 20. No order was made on said date extending the time within which to settle said bill of exceptions, but two days later, on January 22, the court made an order extending the time to file the proposed bill of exceptions for one day, from which it appears there is a hiatus of two days, which would defeat the jurisdiction of this court to entertain the appeal herein.

O'Connell v. United States, 253 U. S. 142, 147; which was affirmed in Exporters v. Butterworth-Judson Co., 258 U. S. 365, 369.

We respectfully submit that there is no error in the record and that the judgment of the lower court should be affirmed.

Dated at Los Angeles this 12 day of Oct., 1923.

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United States Attorney.
HERBERT N. ELLIS,
Special Assistant United States Attorney.